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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 498

LAWRENCE P. HICKEY, GEORGE D. SULLIVAN, JR., BURTON H. YOUNG and THOMAS R. BENZ,

Petitioners,

vs.

THE ILLINOIS CENTRAL RAILROAD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LAWRENCE P. HICKEY,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

LAWRENCE P. HICKEY, GEORGE D. SULLIVAN, JR., BURTON H. YOUNG and THOMAS R. BENZ,

Petitioners,

vs.

THE ILLINOIS CENTRAL RAILROAD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on May 23, 1960.

OPINIONS BELOW.

The opinion of the District Court is unreported. It appears at pp. 17-25 of the Appendix to Petitioner's brief below, copies of which have been filed herewith (hereinafter referred to as Appendix A). The opinion of the Court of Appeals (Appendix B, *infra*, pp. 2a-7a) is reported at 278 F. 2d 529.

JURISDICTION.

The judgment of the Court of Appeals, (Appendix B, *infra*, pp. 2a-7a) was entered on May 23, 1960. The said Court denied a petition for rehearing by order dated June 23, 1960. By order of the Honorable Tom C. Clark, Associate Justice of this Honorable Court, dated September 21, 1960, the time for filing the petition for writ of certiorari in this case was extended to and including October 21, 1960. (Appendix E, *infra*) The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Does the following issue in this case:

> Whether the grant by Act of Congress of 1850 of "the right-of-way through public lands . . . to the State of Illinois for the construction of a railroad . . ." taken in conjunction with the sequent implementation thereof by the State of Illinois by Public Act of 1851 denies the taking of the AIR RIGHTS over the right-of-way upon such public lands from the public domain for private use and exploitation for nonrailroad purposes?

present a federal question that affords the basis of federal jurisdiction for this suit by plaintiffs as citizens for and on behalf of the People of the United States and the People of the State of Illinois.

2. Do not the People of the United States, represented herein by plaintiffs as citizens and taxpayers, have the retained right and the reserved power under the Ninth and Tenth Amendments to the Constitution of the United States to protect the federal public lands against a wrongful taking for private use upon the government's failure or refusal in its custodial duty?

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND STATUTES INVOLVED.

The 9th Amendment:

"The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People."

The 10th Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

STATUTES.

An Act granting the right of way and making a grant of land to the States of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile, 31st Congress, Session 1, Chap. 61, 1850. And in particular, Sections 1, 2 and 4 thereof. (Appendix A. The Complaint, Exhibit 1, p. 5, at pp. 1a to 2a)

An Act to incorporate the Illinois Central Railroad Company, Ill. Stats. Chap. 61, February 10, 1851, and in particular Section 15 thereof. (Appendix A. The Complaint, Exhibit 11, p. 5, at pp. 3a to 19a)

STATEMENT.*

The Basic Federal Grant of Public Land:

The Act of Congress of 1850 made an enormous grant of federal public land to the State of Illinois solely and exclusively for railroad purposes. (Appendix A, The Complaint, Exhibit 1, p. 5 at p. 1a) This grant of public land comprised not only a 200 foot right of way but also an additional tremendous area totalling some 2,500,000 acres flanking the right of way to a distance of 15 miles. Contrary to the misunderstanding of the Court of Appeals as imparted in its opinion below, the total area involved far exceeds the tracts, minute by comparison, upon the Chicago lake front (Appendix B, *infra*, pp. 3a-4a). The right of way, as granted, coursed over federal public land the length and breadth of Illinois from its southern tip at the junction of the Ohio and Mississippi Rivers northward through the State dividing (in shape of a "Y") into branches northeast to Chicago and northwest toward Dubuque. The vast area of the public land along each side of the right of way was to be sold. Under the Act of 1850, the proceeds realized by such sale were expressly and exclusively dedicated to the construction of the railroad upon the granted public lands. (Appendix A, The Complaint, Exhibit 1, p. 5 at p. 2a)

In consequence and in conformance with the grant of public lands by the federal Act of 1850, the recipient, the State of Illinois, provided the Charter for the defendant railroad by its Public Act of 1851. The defendant railroad was thereby created as a body politic and corporate and as the *agent of the State* to implement the Federal

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References to Appendix A are to Appendix of Appellant's Brief in the Court of Appeals unless otherwise indicated.

Act of 1850 by the construction of the railroad. (Appendix A, The Complaint, Ex. H, p. 5, at pp. 3a to 19a)

The Ancillary State Grant of Public Land:

In one particular instance the right of way of the defendant railroad traversed over the public land of the State of Illinois as granted by Paragraph 15 of the State Public Act of 1851. (Appendix A, The Complaint, Exhibit H, p. 5 at pp. 8a through 12a) In this significant situation, the tracks and right of way were originally laid upon a trestle over the submerged public land of Lake Michigan as the railroad right of way traversed the harbor of Chicago. Later the defendant railroad filled in such portion of its right of way by reclaiming such public land (belonging to the State of Illinois) from the Lake. Thereafter, until restrained by the decree of the Federal court, the defendant railroad further reclaimed from Lake Michigan additional adjacent submerged public lands belonging to the State of Illinois for its train yards. (See: Map C at page 413 of the opinion of this Honorable Court in *The Illinois Central Railroad Co. v. People of the State of Illinois*, 146 U.S. 387, depicting the course of the railroad tracks extending over the waters of the Lake and the lake shore line in 1852 together with areas of submerged public lands of the Lake thereafter filled in by defendant railroad)*

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* This was one of the celebrated "Lake Front Cases" in which it was determined that the defendant railroad did not own and never could acquire a fee ownership in such reclaimed and filled in public land constituting the submerged public lands of the State of Illinois. (See 146 U.S. 387 at 444). The rule under Illinois law is set forth in **Revell v. People of the State of Illinois**, 177 Ill. 468 at 478, 479, 480).

Defendant's Wrongful Usurpation and Taking of Public Air Rights Over Public Lands by the Disposition of Same by Sale or Otherwise, to Non-railroad Purposes.

Plaintiffs pray that the Federal Act of 1850 and the State Public Act of 1851 be construed and that it be declared, *inter alia*, that the defendant railroad has no interest in the public lands it occupies except for railroad purposes, also, that in the event of the wrongful disposition to private, non-railroad purposes of the AIR RIGHTS over such public lands, the same revest in and return to the public domain. (Appendix A, the Complaint, p. 5 at p. 16) The proposition of the plaintiffs is that under the Act of 1850 the public air rights intrinsic and belonging to the public lands, given exclusively for railroad purposes, remain in the public domain if not devoted or applied to railroad purposes. A corollary of this contention is that any non-railroad disposition of such public air rights from the public domain—as by sale of same to private use and to non-railroad purpose—constitutes a wrongful usurpation and taking of and from the public domain.

The complaint charges one example of the defendant's wrongful sale of public air rights over its right of way upon public lands to private use for non-railroad purposes: the construction of a skyscraper, multi-storied office structure known as the Prudential Building for a consideration of $2,500,000. (Appendix A, The Complaint, p. 5 at pp. 4 & 5) The complaint charges that defendant intends further wrongful disposition of public air rights over its occupied public lands (both Federal and State public lands) and by way of sale for private use of non-railroad pur-

poses.* (Appendix A. The Complaint, p. 5 at pp. 5-6) These facts well pleaded must be taken as true for the purposes of this motion of the defendant railroad to dismiss the complaint.

By analogy, plaintiffs' protest is like the case of a citizen's and taxpayer's protest against a wrongful sale by a private street or elevated railroad carrier of the air rights over its tracks laid upon the public street of the public domain and to purposes other than public transportation and for its private profit.

The present and potential of value of the public air rights in and to such public lands exclusively throughout Illinois and for other than railroad purposes is inestimable and untold. Just within the limits of the City of Chicago such value exceeds tens of millions of dollars. (Appendix A. The Complaint, p. 5 at p. 6)

The Proceedings Below.

The basis for federal jurisdiction in the court of first instance is founded on the existence of a federal question and arises under the Act of 1850, a Public Act of the Thirty-First Congress of the United States passed at the First Session on September 20, 1850 (Sess. 1, Chap. 61, 1850) as alleged in the complaint (Appendix A. The Complaint, p. 5 at pp. 1 & 2)

This case comes to this Honorable Court upon appeal from the dismissal of the original complaint by the trial court upon motion as a matter of law as affirmed by the Court of Appeals. (Appendix B, *infra*, pp. 2a-7a)

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* In **I. C. R. R. Co. v. City of Chicago**, 141 Ill. 509 (1892), the defendant railroad urged and avoided full tax assessment by the City of Chicago on ground of its limited interest in its right of way on federal public lands granted by the Act of Congress of 1850.

The Motion to Dismiss the complaint averred that the plaintiffs have no authority to maintain this suit on behalf of the federal, state or municipal governments or to maintain this suit as a class or representative suit.* (Appendix A, p. 8-9) The District Court dismissed the suit pursuant to such motion. (Appendix A, pp. 17-25) Upon appeal, the Court of Appeals for the Seventh Circuit affirmed such dismissal order of the district court. The Court of Appeals, however, rested its decision of affirmance not on the opinion of the district court but upon the reasons set forth by the Court of Appeals in its opinion. (Appendix B, *infra*, pp. 2a-7a)

The Court of Appeals did not deny, as did the district court, that the plaintiffs as citizens and taxpayers suing on behalf of the People of the State of Illinois could not maintain this action. The Court of Appeals, however, affirmed the dismissal of plaintiffs' suit on a ground not mentioned by the lower court: the absence of a federal question as pleaded in the Complaint, (Appendix A, The Complaint, p. 5 at p. 1) Both the district court and the Court of Appeals held that plaintiffs as citizens and taxpayers suing for and on behalf of the People of the United States could not maintain this action.

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* It may be stated that the original complaint herein also joined as parties-defendant the Attorney General of the United States, The Attorney General of the State of Illinois, and the Corporation Counsel of the City of Chicago. These government officers were made parties upon the explicitly stated purpose of insuring full notice of these proceedings. (Appendix A, The Complaint, p. 5 at pp. 13 & 14) Thereafter each of said officers moved to be dismissed as a party-defendant herein. The plaintiffs being unable to compel the said officers to act herein in the exercise of their discretionary official powers to either initiate, join or maintain these proceedings, the plaintiffs voluntarily stipulated to the dismissal of said officers as parties-defendant herein upon respective motions made upon their behalf by the law officers of their respective governments.

REASONS FOR GRANTING THE WRIT.

1. *The Court of Appeals Erred in Holding That No Federal Question Exists As a Basis for Jurisdiction, Such Holding Being Contrary to the Settled Rule of This Honorable Court That An Issue Going to the Quantum of a Federal Land Grant Presents a Federal Question.*

The Act of Congress of 1850 provides the quantum of interest granted for the "right of way" of the defendant railroad over public lands. A vital issue here concerns whether the extent of such quantum of interest so granted conveys out of the public domain the air rights over such public lands for private use and exploitation for non-railroad purposes. That a federal question is raised by such issue is exemplified by *United State* v. *Union Pacific Railroad Co.* 353 U.S. 113; 77 S Ct. 685, (1957). While in *Union Pacific* the issue related to mineral rights instead of air rights, as disputed here, the subject matter in question of each case equally and identically turned upon a statutory construction of the extent of the quantum of interest granted by an Act of Congress.

The Court of Appeals in its opinion below held the *Union Pacific* case did not furnish an example of a federal question as a basis for jurisdiction because jurisdiction attached therein, anyway, inasmuch as the suit was brought by the United States.(Appendix B, p. 6a) This is error. Although the United States was a party in *Union Pacific* the subject matter of that case—the indispensable ingredient for the existence of a cause of action—was solely an issue over the quantum of interest granted by Act of Congress, a federal question. Likewise here the issue and subject matter of this case is the quantum of a grant by Act of Congress, a federal question affording the basis for federal jurisdiction. That it is necessary in the event of the presence of a federal question that

the United States be a party so as to furnish the basis for federal jurisdiction is clearly fallacious. Such fallacy is shown by the many cases set forth in footnote by this Honorable Court in *Union Pacific* (353 U. S. at 118 and 77 S. Ct. at 688). These many cited actions were between the railroads and third persons, such as homesteaders, miners, etc. The United States was not a party in these actions. All of these cases, as here, had as a basis for jurisdiction a federal question respecting the quantum of a grant of public lands by Act of Congress.

It is respectfully concluded that the Complaint herein, seeking declaratory judgment respecting the construction of the Act of 1850, granting federal public lands, raises a federal question. The erroneous decision of the Court of Appeals, below, is in direct conflict with the many prior decisions of this Honorable Court and should not stand.

2. *The Court of Appeals Erred in Holding That Plaintiffs as Citizens and Taxpayers of the United States Have No Standing to Sue on Behalf of the People of the United States to Prevent an Otherwise Resultant Wrongful Loss and Taking of the Public Property of the United States.*

The Court of Appeals erred in its rejection of the above proposition by improperly extending the doctrine of *Massachusetts* v. *Mellon*, 262 U. S. 447, and *Alabama Power Co.* v. *Ickes*, 302 U. S. 464.

We most earnestly submit that the *Massachusetts* and *Alabama Power* cases were never intended as a categorical rejection under any and all circumstances of the right of federal citizens and taxpayers to sue for and on behalf of the People of the United States so as to refuse the plaintiffs' action. A total difference in reason and substance exists between the essence of the right

which plaintiffs maintain, here, and the nature of the asserted right foreclosed in the *Massachusetts* and *Alabama Power* cases. Such disparity is so great as to urge a review by this Honorable Court.

In both *Massachusetts* and *Alabama Power*, alike, a taxpayer *collaterally* challenged the constitutionality of a congressional appropriation of federal funds for governmental purposes. This Honorable Court refused to allow such type of collateral attack upon every appropriation act "whose administration requires the outlay of public money and whose validity may be questioned." However, no such possibility of governmental harassment or hindrance of public affairs exists in the case at hand. The government is not a party. There is no challenge of the unconstitutionality of any legislation. This case, though rare and uncommon, is against a private party in complaint against a wrongful taking of public property. The nation can only be benefited. Mischief is prevented and remedied, not augmented.

Even in *Massachusetts* and *Alabama Power* the avenue of direct attack remained open for a citizen and taxpayer who "has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement." Here, however, the Court of Appeals by denying a federal citizens and taxpayers action would eliminate every avenue of defense of the public interest under law in the event of the default of the general government's custodial duty of the public property of the nation.

This action is a true class action. Plaintiffs, as citizens and taxpayers of the United States, sue for and on behalf of the People of the United States, seek to enforce a common and indivisible right and undivided interest in and to the public property of the United States. (See Rule 23(a)(1) of Federal Rules of Civil Procedure.)

3. *The Present Action by Plaintiffs as Citizens and Taxpayers for and on Behalf of the People of the United States to Prevent the Wrongful Private Taking of Federal Public Lands for Private Profit Is Authorized and Validated by the Ninth and Tenth Amendments to the Constitution of the United States.*

We can conceive of no more compelling situation requiring the application of the Ninth and Tenth Amendments in recognition of the rights retained and the powers reserved to the People than the instant citizens and taxpayers complaint against the wrongful taking of public lands of the United States upon the government's failure or refusal in its custodial duty.

This question is a matter of first impression in this Honorable Court. The substance of this constitutional issue was presented to the Courts below: (Appendix A. The Complaint, p. 5 at pp. 15 & 16) It has, nonetheless, been ignored in these proceedings. We are aware of no definitive declaration by this Honorable Court respecting the retained rights and reserved powers of the People under the Ninth and Tenth Amendments.

The plaintiffs as citizens of the United States are the constituent members of and form the sovereignty, the People of the United States. (See *Dred Scott* v. *Sanford*, 60 U. S. 393, 404; (1856)). Thus, the People of the United States, including plaintiffs, as sovereign, own the public lands of the United States. This right has never been relinquished, the general government having only the custodial right to act for the sovereign People respecting said public lands.

Under the Ninth and Tenth Amendments to the Constitution the rights and powers not delegated to the general government of the United States by the Constitution are reserved to the People, including the plaintiffs as

constitutent members of the People, the sovereignty. The powers the People have given to the general government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the People and can be exercised only by them; or upon further grant from them. (See *U. S.* v. *Williams*, 194 U. S. 279, 48 L. Ed. 979).

Any wrongful or illegal taking, usurpation or loss of the public lands belonging to the sovereignty, the People, is therefore a wrong not only to the general government as custodian of the property in trust, but, fundamentally is a wrong to and upon the People.

It is utterly fundamental law basic to the very existence and preservation of any polity that public lands may not be wrongfully taken from the public domain. See Leviathan, (1651), Chap. 26, XXVI of Civil Laws by Thomas Hobbes:

> "For a fundamental law in every Commonwealth is that, which, being taken away, the Commonwealth faileth and is utterly dissolved, as a building whose foundation is destroyed."

The right of the People in the fundamental law for the self-preservation and very existence of the State would be a meaningless and empty thing if not able to be implemented by a remedy. Where the People are wronged and the legislative and executive powers of the general government in custodial duty are in default for failure to redress the wrong on behalf of the People, the People may appeal to the judicial power as a last resort. To effect such appeal to the judicial power on behalf of the People, the plaintiffs sue as citizens and taxpayers and as constituent members of the sovereign People and are before the Court in representative capacity, a conventional role in complaint for declaratory relief and in equity.

Admittedly, the occasion for a citizen and taxpayer to protect national public lands is most infrequent. Yet, it is most wholesome that this doctrine remain poised as an ultimate check in the protection of the nation's public lands.* The Attorney General cannot be compelled to act by way of mandamus. He may be sheltered from effective criticism by the obscurity of the statute which should be, but is not, enforced. The remaining and sole safeguard for the commonwealth is then in the ancient right of the sovereign, in our case the citizen and taxpayer, for relief against the wrongful taker of public lands.

We conclude this suit by plaintiffs for and on behalf of the People of the United States to be authorized and validated by the Ninth and Tenth Amendments to the Constitution of the United States. It gives reason to this Honorable Court to issue the writ here upon this question of first impression.

4. *The Court of Appeals Erred in Failing to Hold That Plaintiffs, as Citizens and Taxpayers of Illinois, Can Sue for and on Behalf of the People of the State of Illinois for Declaratory Relief on the Federal Question at Hand to Prevent an Otherwise Wrongful Taking of the Public Property of the State of Illinois.*

We first emphasize that the Court of Appeals abstained from ruling upon the above proposition (Appendix B, p.

* The situation of a wrongful taking for private use is significantly different from circumstances where the government, itself, acts in an alleged wrongful disposition of public lands, as pursuant to legislation challenged as unconstitutional. In such latter situation the objection of the People may be deemed to have been foreclosed by their consent through exercise of the right of suffrage, the objectionable action of the government being thus performed by and through their own representatives.

4a & 5a) because it, otherwise, decided that no federal question existed in this cause as a basis for jurisdiction. Thus, there has, as yet, been no finding on this proposition, the issue plaintiffs raised upon appeal, below, respecting their substantive right to maintain this action as a matter of Illinois law. If a federal question does exist in this case, plaintiffs are still entitled to a determination on appeal of their said taxpayer's right of action based on the substantive law of Illinois.

The nature of the public property of the State of Illinois which plaintiffs, as citizens and taxpayers of Illinois, seek to protect against a wrongful taking is manifest. It comprises:

(A) The interest of the State of Illinois in and to the air rights over the lands granted to the State of Illinois by the Act of 1850 for the construction of a railroad right of way;

(B) The air rights over State public lands constituting, for example, the reclaimed submerged lands of Lake Michigan occupied by defendant's right of way pursuant to the Public Act of 1851 of Illinois enacted in conformance and in consequence to said federal Act of 1850.

Plaintiffs, as citizens and taxpayers of Illinois, complain against the wrongful taking of such air-rights from the public domain and to private use for non-railroad purposes as a depredation of the public lands of the State of Illinois.

The taxpayer action has long been firmly established as valid legal doctrine in Illinois. The taxpayer of Illinois has the right of action on behalf of the People against any wrongful and illegal taking of public property from the public domain. The purpose and scope of such action is:

"TO PREVENT THE WRONGFUL AND ILLEGAL TAKING, USURPATION AND LOSS, OF PUBLIC PROPERTY, INCLUDING FUNDS, AND TO RECOVER AND COMPEL RESTORATION AND RESTITUTION OF PUBLIC PROPERTY, INCLUDING FUNDS, WRONGFULLY AND ILLEGALLY TAKEN."

This principle is supported by many, many Illinois cases. (See: *McCord* v. *Pike*, 121 Ill. 288 at 290, 291; 12 N.E. 259 (1887); *Jones* v. *O'Connell*, 266 Ill. 443 at 447, 448, 107 N.E. 731 (1915); *Saxby* v. *Sonneman*, 318 Ill. 609; 149 N. E. 526 (1925); *Fergus* v. *Russel*, 270 Ill. 304; 110 N. E. 130 (1915); *Burke* v. *Snively*, 208 Ill. 328 at 336; 70 N. E. 327 (1904).

To avoid a recurrence of the trial court's confusion respecting the nature of a true taxpayer's action we emphasize: (1) a valid taxpayer's action is necessarily and always based upon an injury to the plaintiff taxpayer that is suffered in common with all other taxpayers with benefit of recovery going to the public; and (2) a valid taxpayer's action relates to a *wrongful taking of public property out of and from* the public domain and not a mere *misuse* of public property *within* the public domain. Both of these pre-requisites are met by the case at hand. The injury to the plaintiffs is suffered in common with other taxpayers. Also, this action relates to a *wrongful taking* of air rights *out of and from* the public domain and not a *mere misuse* of air rights within the public domain. It was the mistake of the trial court below to misunderstand these factors in its sole citation of authority against the right of action by an Illinois taxpayer, *Koehler* v. *Century of Progress*, 354 Ill. 347. Under the facts of the *Koehler* case, there was no *wrongful taking out of and from the public domain.* The *Koehler* case, thus stands only as an example of a situation which fails to qualify as a true taxpayer's action. The *Koehler* case, however, does not stand for a denial of the taxpayer's

proceedings, *per se*, as a proper and legitimate form of action at law.

The federal question of the construction of the Act of 1850 respecting the quantum of the grant of public lands to the State of Illinois is indispensable to the protection of the rights of the State of Illinois under such Act of 1850. Moreover, such statutory construction is also important to the sequent matter of the construction of the charter of the defendant railroad respecting the quantum of the grant of state public lands made thereby. The taxpayer of Illinois has the right to seek such statutory construction in a federal court in protection of the public property of the State of Illinois.

CONCLUSION

We respectfully suggest the reasons for granting the writ: in correction of the errors of the Court of Appeals hostile to the sound law established by this Honorable Court; in application of constitutional right of the People of the United States, a determination of first impression here; and, finally, the preservation of the entitlement of a state taxpayer to decision on appeal if a federal question exists—all require that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Page citations in the text of this petition with respect to Appendix A refer to the page numbers of the Appendix to Appellant's Brief in the Court of Appeals, copies of which have been filed herewith. All references to the Complaint appear as "P-5" followed by the particular page of the Complaint or Exhibit thereto.

APPENDIX B.

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 12846 SEPTEMBER TERM, 1959—APRIL SESSION, 196

LAWRENCE P. HICKEY, GEORGE D. SULLIVAN, JR., BURTON H. YOUNG and THOMAS R. BENZ,
Plaintiffs-Appellants,
v.
THE ILLINOIS CENTRAL RAILROAD, an Illinois corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

May 23, 1960

Before DUFFY and SCHNACKENBERG, *Circuit Judges*, and PLATT, *District Judge*.

SCHNACKENBERG, *Circuit Judge*. Lawrence P. Hickey, George D. Sullivan, Jr., Burton H. Young and Thomas R. Benz, plaintiffs, have appealed from an order entered by the district court dismissing their suit against the Illinois Central Railroad company, an Illinois corporation, sued herein as "The Illinois Central Railroad".[1]

Plaintiffs sued as citizens and taxpayers of both the state of Illinois and the United States. They also sued by way of representation pursuant to 28 U. S. C. A. ru

[1] William P. Rogers, attorney general of the United States, I... Castle, attorney general of the state of Illinois, and John C. Melaniphy, corporation counsel of the city of Chicago, were also named as defendants but the suit was dismissed as to them, to which plaintiffs agreed

23, on behalf of others similarly situated, including the people of the city of Chicago.

They briefly state the subject matter of their lawsuit to be the air rights of the land occupied, used or controlled by the Illinois Central Railroad Company (herein referred to as defendant), for railroad purposes. The record before us indicates that the area involved lies east of Michigan avenue and fronts upon Lake Michigan, between Monroe street and the Chicago river.

It is plaintiffs contention that defendant has no right to such land, including reclaimed submerged land, except to occupy, use and control the same for its railroad purposes, and that the railroad has no dominion over the air rights in and to such land except for railroad purposes. Plaintiffs further contend that defendant wrongfully usurped dominion over the air rights to such land when it sold the same to the "Prudential Building."

Stated briefly, plaintiffs list the sources, documents and events, upon which they base their complaint, as follows:

1. The United States of America, by way of grant of public lands of the United States to the State of Illinois by the Act of Congress of 1850 (9 Stat. 466, 1850);

2. The United States of America by way of conveyance or permissive use apart from the Act of 1850;

3. The State of Illinois by virtue of the charter incorporating the defendant (Illinois Private Laws, 1851);

4. The City of Chicago by virtue of various ordinances of the common council, principal among which was that ordinance adopted June 13, 1852;

5. Conveyances by way of deed from private persons, firms or corporations;

6. Acquisition by condemnation, the right of eminent domain having been granted to defendant by the State of Illinois in said charter;

7. Filling in and taking of submerged lands of the State of Illinois along the shore line of Lake Michigan.

It is plaintiffs' theory that the air rights, which they state defendant has sold to the "Prudential Building", "have been and are being wrongfully and illegally taken and usurped by the defendant railroad for other than railroad purposes, and, sold or otherwise disposed of to the wrongful, illegal and permanent loss, injury and damage of the right, interest and entitlement thereto of the People of the State of Illinois, the People of the United States and others similarly situation, including the People of the City of Chicago".

They seek by their suit, *inter alia*, to have a judicial declaration that the land and air rights have reverted to the people of the state of Illinois, or the people of the United States, or others similarly situated, including the people of the city of Chicago, and that all monies received by defendant on account of its sale of the land or air rights which are devoted to other than railroad purposes be deposited with the court pending determination of who is entitled thereto.

It is agreed that the following are the questions which we must decide:

1. Whether plaintiffs have no authority to maintain this suit on behalf of the federal, state or municipal governments.

2. Whether plaintiffs have no authority to maintain this suit as a representative suit.

1. As to the alleged authority of plaintiffs to sue on behalf of the federal government, we note that, in *Massachusetts* v. *Mellon*, 262 U.S. 447, 487, it was said

> "The administration of any statute, likely to produce additional taxation to be imposed upon a very numerous number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individ-

concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.

" " " The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. " " "

In *Alabama Power Co. v. Ickes*, 302 U.S. 464, 478, the court said:

" " " Petitioner alleges that it is a taxpayer; but the interest of a taxpayer in the moneys of the federal treasury furnishes no basis for an appeal to the preventive powers of a court of equity. *Massachusetts v. Mellon*, 262 U.S. 447, 486, *et seq.* " " "

Accordingly, we hold that plaintiffs cannot maintain this action on behalf of the federal government or, as they have also stated it, on behalf of the people of the United States.

2. Plaintiffs contend that their suit is maintainable on behalf of the people of the state of Illinois, and also the people of the city of Chicago. If their suit is maintainable on this theory, which we do not decide at this time,

then they have instituted in a federal district court an action in which all the parties are citizens of the state of Illinois. Absent any other ground of federal jurisdiction, this lack of diversity of citizenship deprives the federal courts of jurisdiction of this cause of action. The situation in this case is in strong contrast to that in *State of Illinois* v. *Illinois Central R. Co.*, 33 Fed. 721, cited by plaintiffs, in which there was present in the case an issue of constitutionality arising under the constitution of the United States. It was there held, at 726, that the presence of this issue gave the federal courts jurisdiction.

If the state of Illinois were to sue the defendant for default in any of the obligations which the latter assumed to the state in the charter of 1851, the fact that the state had theretofore acquired the land in question from the federal government by the congressional grant of 1850 would not inject a federal question into the case. Defendant was a stranger to that grant. Whether or not the United States could have maintained an action against defendant, because of facts alleged by plaintiffs herein, based upon the Act of 1850, we need not decide, because no such case is before us.

Belatedly, plaintiffs in their reply brief attempt to fortify federal jurisprudence by citing *U. S.* v. *Union Pac. R. Co.*, 353 U.S. 112. However, that case was brought by the *United States* itself. Of course, the federal courts are always open to entertain suits by the federal government on its own behalf. Art. III, § 2, Constitution of United States.

We conclude that, insofar as plaintiffs sue on behalf of the people of the State and City, the case is not within the jurisdiction of the federal courts.

3. Lastly plaintiffs argue that they properly maintain their suit as a class action pursuant to 28 U.S.C.A. Rule 23. It is clear from their brief that plaintiffs purport to represent others having *private* reversionary interests when they seek a declaration of the defendant's lack of interest in the land and air rights. They state that they rely on rule 23 in asserting the rights of persons not

stituting a numerous class having a common or general interest in the relief sought against defendant.

However, assuming that there is such a class for whose a suit under rule 23 (a) might be brought, plaintiffs have not shown that they are authorized by that rule to bring the suit. The rule provides that such a suit may be brought by one or more members of the class. There is no allegation that plaintiffs are members of that class. *Rock Drilling v. Mason & Hanger Co.*, 217 F.2d 687, 693.

For the reasons set forth, the order of the district court is affirmed.

AFFIRMED.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois.

Monday, May 23, 1960

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Casper Platt, District Judge

Lawrence P. Hickey, George D. Sullivan, Jr., Burton H. Young and Thomas R. Benz, Plaintiffs-Appellants, vs. The Illinois Central Railroad, an Illinois corporation, Defendant-Appellee	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12846	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, June 23, 1960

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Casper Platt, District Judge

Lawrence P. Hickey, et al., Plaintiffs-Appellants, vs. The Illinois Central Railroad, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12846	

It is ordered by the Court that the petition for rehearing filed by appellants in the above-entitled cause be, and the same is hereby, Denied.

APPENDIX E

SUPREME COURT OF THE UNITED STATES.

No. ....., October Term, 1960.

LAWRENCE P. HICKEY, ET AL.,

Petitioners,

v.

THE ILLINOIS CENTRAL RAILROAD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

Upon Consideration of the application of petitioners

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 21, 1960.

/s/ Tom C. Clark
Associate Justice of the Supreme Court of the United States

Dated this 21st day of September, 1960.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 498

LAWRENCE P. BICKEY, GEORGE D. SULLIVAN, JR., BURTON H. YOUNG AND THOMAS R. BENZ,

Petitioners,

vs.

THE ILLINOIS CENTRAL RAILROAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE ILLINOIS CENTRAL RAILROAD COMPANY IN OPPOSITION

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I. A private citizen, resident or taxpayer has no right to sue on behalf of the United States to establish and recover a property interest which he conceives may belong to or be recoverable by the United States. Such a suit must be instituted and prosecuted on behalf of the United States by the Attorney General or a district attorney acting under his supervision and control. The Ninth and Tenth Amendments to the Constitution of the United States do not aid plaintiffs 5

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IN THE

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LAWRENCE P. HICKEY, GEORGE D. SULLIVAN, JR., BURTON H. YOUNG AND THOMAS R. BENZ,

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THE ILLINOIS CENTRAL RAILROAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE ILLINOIS CENTRAL RAILROAD COMPANY IN OPPOSITION.

The respondent, Illinois Central Railroad Company, submits this brief in opposition to the petition for certiorari in the above cause.

JURISDICTION.

Petitioners' suit does not present a case within the jurisdiction of the federal courts for reasons hereafter more particularly set forth.

QUESTIONS PRESENTED.

1. Whether a private citizen can on his own [illegible] institute and maintain a suit on behalf of the United States to establish and enforce a property interest which he conceives may belong to and be recoverable by the United States, or whether such a suit must be brought on behalf of the United States by its Attorney General or a district attorney acting under his supervision and control.

2. Whether the federal court has jurisdiction of a suit affecting Illinois real estate merely because title thereto originated under a law of the United States, although the United States is not a proper party, by reason of the fact that the suit is purportedly brought on its behalf by a private citizen not authorized to institute the suit, and although no diversity of citizenship between the remaining parties is alleged or shown.

STATEMENT.

The petition does not present with brevity and clearness the nature of plaintiffs' action. The nature of the action is set forth in the opinion of the Court of Appeals as well as of the District Court. In broad outline the plaintiffs, four Chicago lawyers purporting to sue as "citizens, residents and taxpayers" of the United States and the State of Illinois, seek to enforce an alleged reversionary interest in real estate of the respondent railroad situated in Illinois. Plaintiffs do not themselves claim any interest in the alleged reversionary rights, but rest the theory of their suit that those interests are vesting in either (1) the United States, or (2) the State of Illinois, or (3) the heirs or devisees of persons, firms or corporations from which the respondent railroad acquired such real estate by purchase, condemnation or

ales. Petitioners assume to sue for and on behalf of those various parties.

Plaintiffs made William P. Rogers, Attorney General of the United States, a defendant, alleging that as head of the Department of Justice, he had discretionary power in the matter of the institution and prosecution of actions and proceedings in favor of the United States; that to insure full notice of the proceedings to the Attorney General so that he might take such action as was deemed appropriate in the protection, preservation and assertion of the rights of the United States, he was joined as a party defendant. The Attorney General of Illinois and the Corporation Counsel of the City of Chicago were also named defendants under similar averments so far as their respective governmental bodies were concerned. Each of the above defendants moved that the cause be dismissed as to him and by consent of plaintiffs, this was done. Thus left as the only parties to the suit the four individual plaintiffs and the respondent railroad.

The District Court dismissed the suit on respondent's motion, holding (1) that plaintiffs as ordinary citizens could not maintain the suit on behalf of the United States; (2) that plaintiffs as ordinary citizens could not sue on behalf of the State of Illinois; (3) that the alleged claims on behalf of the City of Chicago had been asserted or argued in plaintiffs' briefs or oral arguments, and any claims in that behalf had been waived; and that (4) plaintiffs could not maintain the suit as a class action on behalf of the heirs or devisees of persons, firms or corporations from which the respondent railroad had acquired the real estate by purchase, condemnation or otherwise, since plaintiffs themselves claimed no interest in any of the properties involved and were not members of the alleged class. The District Court did not pass on the question of federal jurisdiction. Petitioners here raise no ques-

tion with respect to their alleged right to sue on behalf of the City of Chicago or the heirs or devisees of parties from whom the respondent railroad acquired the real estate by purchase, condemnation or otherwise.

The Court of Appeals affirmed, holding that plaintiffs as ordinary citizens could not sue on behalf of the United States; that since the suit was not properly brought on behalf of the United States, it constituted no more than a suit involving Illinois real estate, where no diversity of citizenship was alleged, and that the federal court was therefore without jurisdiction. The Court of Appeals also held that plaintiffs could not maintain the suit as a class action.

After the decision of the Court of Appeals, petitioners acquiesced in its ruling with respect to federal jurisdiction by commencing a new suit in the state court predicated on the same theory as their action in the federal court, except that in the state court action they did not assume to sue on behalf of the United States. This suit is now pending in the Circuit Court of Cook County

1 *Hawkes, et al. v. The Illinois Central Railroad, [illegible]* 60 C 9761 in the Circuit Court of Cook County, Illinois.

REASONS FOR DENYING THE WRIT.

I.

A Private Citizen, Resident or Taxpayer Has No Right to Sue on Behalf of the United States to Establish and Recover a Property Interest Which He Conceives May Belong to or Be Recoverable by the United States. Such a Suit Must Be Instituted and Prosecuted on Behalf of the United States by the Attorney General or a District Attorney Acting Under His Supervision and Control.

The proposition stated above is well settled. As early as the *Confiscation Cases*, 7 Wall. (74 U. S.) 454, 457, the rule was announced by this Court as follows:

> "Civil suits, in the name and for the benefit of the United States, are also instituted by the district attorney, and, in the absence of any directions from the Attorney-General, he controls the prosecution of the same in the district and circuit courts, and may, if he sees fit, allow the plaintiffs to become nonsuit, or consent to a discontinuance.
>
> "Settled rule is that those courts will not recognize any suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney or some one designated by him to attend to such business, in his absence, as may appertain to the duties of his office."

In *United States v. San Jacinto Tin Company*, 125 U. S. 273, 279, the controlling principle is stated as follows:

> "* * * There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States

> in every judicial district are officers of this character and they are by statute under the immediate supervision and control of the Attorney General. • • •.

The principles stated above are not only supported by precedent, but they are deeply grounded in public policy. The commencement of any suit, including one on behalf of the United States, of necessity involves advance judgment and discretion. If the suit would be groundless or without proper legal basis, it obviously should not be commenced. The prosecution of a suit for and on behalf of the sovereignty not only involves expense and the time of attorneys for the government, but the defense of such a suit imposes probably heavier burdens on a defendant than would be the case in a suit brought by an individual plaintiff. It is important, therefore, that some responsible government officer exercise sound discretion before such a suit is commenced and determine whether there is good cause for the sovereign government to come into court as a plaintiff and engage in expensive and time consuming litigation. That discretion has wisely been conferred upon the Attorney General of the United States or district attorneys acting under his supervision and control. This thought is forcefully expressed in *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 279, cited above. There this Court further points out:

> "If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. • • •."

The doctrine contended for by plaintiffs, *i.e.*, that any private citizen may on his own initiative by-pass the At-

torney General and institute and maintain a suit for or on behalf of the United States whenever he conceives that the sovereignty may have a cause of action to recover property supposed to belong to it, does violence to the principles stated above. Indeed, it would go far to nullify some of the most important functions of the office of Attorney General of the United States.

Petitioners in both the District Court and the Court of Appeals sought to support their right to sue on behalf of the United States on the theory that their action could be sustained as a taxpayers' suit. This claim is settled adversely to plaintiffs' contention by the decisions of this Court in *Massachusetts* v. *Mellon*, 262 U. S. 447, and *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, as the opinion of the Court of Appeals points out. (Appendix B, pp. 4a and 5a.)

Petitioners' contention that they may sue on behalf of the United States by reason of the provisions of the Ninth and Tenth Amendments to the Constitution of the United States is patently without substance. It cannot be doubted that the powers granted to the national government are ample to create a sovereignty capable of complete, efficient, and practical action, and this extends to the proper functioning of the various departments of that government, including the offices of Attorney General, and district attorneys subject to his supervision. It does not reserve to every private citizen the right to control and supersede the exercise of discretion by these important officers whenever the citizen may happen to disagree with the way in which that discretion has been exercised, any more than it reserves to private citizens the right to sue to partition real estate used for governmental purposes. It is clear that the Court of Appeals, as well as the District Court, correctly held that plaintiffs cannot maintain their suit for and on behalf of the United States.

II.

Since Plaintiffs Cannot Maintain Their Suit on Behalf of the United States, a Want of Federal Jurisdiction Exists.

Inasmuch as plaintiffs cannot sue on behalf of the United States, as above pointed out, the suit resolves itself into a controversy relating to the title to Illinois lands where no diversity of citizenship is alleged, and where the only ground for claiming federal jurisdiction is the fact that a portion of defendant's real estate was acquired by its predecessor in title under a grant from the United States. This is clearly not enough to support federal jurisdiction. In stating that principle to be the law, this Court in *Shoshone v. McDougal*, 225 U. S. 561, 569, observed:

> "This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to the laws [of the United States]."

A number of cases are cited in that opinion in support of the proposition stated above.

Petitioners assume to place great reliance on *United States v. Union Pacific Railroad*, 353 U. S. 112. But there the action was brought by the United States and as the opinion of the Court of Appeals points out, Article III, § 2, of the United States Constitution expressly confers jurisdiction on federal courts over "controversies to which the United States shall be a party • • •." In the *Union Pacific Railroad* case the United States was a party. Here it is not.

At page 10 of the petition, reference is made to cases cited in a footnote in *Union Pacific* (353 U. S. at 118

with the assertion that the United States was not a party in the actions involved, but the basis for jurisdiction in each was "a federal question respecting the quantum of a grant of public lands by Act of Congress." This assertion is incorrect and misleading. Of the 7 cases cited 5 originated with actions brought in state courts. In the remaining two (*Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U. S. 190, and *Choctaw, O. & G. R. Co. v. Mackey*, 256 U. S. 531) the actions were instituted in the federal courts, but proper grounds of federal jurisdiction existed.

It is clear that the Court of Appeals was right in disposing of the case at bar on jurisdictional grounds.

III.

Petitioners' Claim That They May Sue on Behalf of the State of Illinois Is Immaterial.

Petitioners finally contend, commencing at page 14 of their petition, that they are entitled to sue on behalf of the State of Illinois, and that the Court of Appeals should have so found. Inasmuch as grounds for federal jurisdiction are here wanting, for reasons pointed out under I and II above, the question of whether plaintiffs may sue on behalf of the State of Illinois becomes immaterial so far as this action is concerned.

CONCLUSION.

In conclusion, we submit that no sufficient ground for certiorari has been presented. The petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 498

LAWRENCE P. HICKEY, GEORGE D. SULLIVAN, JR., BURTON H. YOUNG and THOMAS R. BENZ,

Petitioners,

vs.

THE ILLINOIS CENTRAL RAILROAD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONERS' REPLY TO THE BRIEF OF THE ILLINOIS CENTRAL RAILROAD COMPANY.

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IN THE

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PETITIONERS' REPLY TO THE BRIEF OF THE ILLINOIS CENTRAL RAILROAD COMPANY.

The opposition to the issuance of the writ depends on three points. We reverse the respondent's numerical order of these propositions, and as follows:

III. Petitioners' claim that they may sue on behalf of the State of Illinois is immaterial.

II. Since plaintiffs cannot maintain their suit on behalf of the United States, a want of federal jurisdiction exists.

I. A private citizen, resident or taxpayer has no right to sue on behalf of the United States to establish and recover a property interest which

> he conceives may belong to or be recoverable by the United States. Such a suit must be instituted and prosecuted on behalf of the United States by the Attorney General or a District Attorney acting under his supervision and control.

and, briefly, reply to each.

IN REPLY TO RESPONDENT'S POINT III.

The trial court denied the capacity of petitioners as state citizens and taxpayers to sue in protection against, and prevention of loss of state public property. The trial court also denied the capacity of petitioners as United States citizens and taxpayers to sue in protection against, and prevention of, loss of national public property. Before the Court of Appeals, we contended that the trial court erred in both respects. However, the Court of Appeals, while affirming the trial court on the latter aspect, significantly and explicitly excepted from its decision any ruling whatsoever upon the former aspect respecting the right of action of petitioners as citizens and taxpayers suing on behalf of the People of the State of Illinois.

We now respectfully maintain that the Court of Appeals erred not only in failing to reverse the trial court's dismissal of the plaintiff's action as state citizens and taxpayers, but, also, in expressly avoiding a decision on this point of appeal. Of course, the Court of Appeals avoided making such decision on the stated reason that:

> ". . . the fact that the state had theretofore acquired the land in question fro[illegible] the federal government by congressional grant of 1[illegible] would not inject a federal question into the case."

But if the Court of Appeals is wrong and a federal question exists, then the plaintiffs' right to sue as citizens

and taxpayers of the State of Illinois is most material. Thus, respondent's point to the contrary is not well taken. We now turn to respondent's Point II, as to the matter of the federal question.

IN REPLY TO RESPONDENT'S POINT II.

The interest of the State of Illinois in the lands granted pursuant to the Act of Congress of 1850 is the claim that, subject to a servitude of use and occupancy for railroad purposes, these lands belong to the State; and, moreover, that these lands may not be alienated to private use and profit apart from railroad purposes. The complaint charges that the defendant railroad claims in opposition that the defendant railroad is entitled to such lands for any and all purposes and, moreover, that the defendant railroad threatens the sale of interests of tremendous value in said lands (air rights over same) to private uses apart from railroad purposes and to the defendant's private profit. A determination of the residual or reversionary interests of the federal government, if any, is also involved.

Obviously, a construction of the Act of Congress of 1850 as to the nature of the quantum of such land grant is at the core of this action. Clearly, a federal question exists. The same issue, as to the quantum of a federal grant, was the crux of *U. S.* v. *Union Pacific Railroad Co.*, 353 U. S. 112, 77 S. Ct. 685 (1957), where the dispute arose over subsurface mineral rights.

While respondent makes much of the fact that the United States was party plaintiff in the *Union Pacific* case, such fact is a mere supervention. Without the federal question (arising out of the issue of the quantum of the federal grant) there would have been no *subject matter* in the *Union Pacific* action and there would have

been no justiciable issue. This Honorable Court observed in Union Pacific: (at page 686)

> "The claim of the United States is that 'the right of way' granted by the Act (Act of July 1, 1862, 12 Stat. 489) is not a grant that includes mineral rights." (parenthesis notation added)

Certainly the presence of the United States as a party in *Union Pacific* did not supply the federal question. On the other hand, it was the determination of the quantum of the grant under the federal Act in *Union Pacific*; as likewise here, that constituted the federal question. Respondent errs in maintaining that a federal question respecting a quantum of a federal land grant (as in *Union Pacific*) somehow disappears from a law suit if a party other than the United States, as here, asserts the same issue. It may only be concluded that a justiciable federal question exists in this case as properly raised by the plaintiffs in their capacity as citizens and taxpayers on behalf of the People of the State of Illinois. Accordingly, and without more, we stress that the Court of Appeals must be reversed for erroneously sustaining the dismissal of this action. We continue to further assert, however, that the plaintiffs have the additional right and capacity to sue as citizens and taxpayers of the United States. On behalf of this further and additional right of plaintiffs as citizens and taxpayers of the United States, we now turn in reply to the defendant's first proposition.

IN REPLY TO RESPONDENT'S POINT I.

Respondent's Point I, in opposition to the right and capacity of plaintiffs on behalf of the People of the United States in this lawsuit, is utterly specious.

It is to be noted that an action brought by a citizen and taxpayer is *always* in the name of the party citizen

and taxpayer. It *never* is in the name of the public entity, whether municipal, state or federal. This point is obvious. In no single instance has a citizen's and taxpayer's suit ever been properly brought where the citizen and taxpayer sues in or uses any name other than his own as plaintiff. The reason is manifest: *the citizen and taxpayer is the plaintiff, not the government.*

The federal government should have brought this action in protection of the interests of the United States. If it had, your petitioners would admittedly have had no standing here in such case. The law business of the federal government is handled by the Attorney General, not the plaintiffs. But, the simple fact is that the federal government did not bring this action. And, moreover, apart from such neglect and failure, the government has even refused to join herein after notice by way of service of summons in this cause upon the Attorney General of the United States. Thus, the federal government has disclaimed this lawsuit as part of the law business of the United States. It is such disclaimer that then affords the plaintiffs, as citizens and taxpayers on behalf of the People of the United States, their right to protect the public property of the United States against loss, depredation and wrongful taking.

Governmental indisposition as to what should be its law business is, of course, the genesis of all citizen's and taxpayer's actions in the public interest. Thus the defendant's citations of authority (*Confiscation Cases*, 74 U. S. 454 (1868) nor *U. S.* v. *San Jacinto Tin Co.*, 125 U. S. 273 (1887)) are absolutely irrelevant here. In contrast to the situation, at hand, in each of these references the action was brought in the *name of the United States* and a legal representative of the government directly and actively participated. It could hardly be more

obvious, therefore, that the cited cases failed for some other reason than not being instituted by the United States as a party and prosecuted by someone other than the Attorney General or some duly authorized legal officer of the United States. Furthermore, neither of these cited references pertained to a citizen's and a taxpayer's suit complaining of a wrongful taking of the national public property where the Attorney General for one reason or another failed or refused to act in protection and prevention against such wrongful taking.

May we remind this Honorable Court of its observation in the *San Jacinto* case: (at page 284)

> "We are not INSENSIBLE to the economic power and its capacity for evil thus reposed in that (Attorney General) department of government." (Emphasis added)

We stress again the wholesome effect of a citizen and taxpayer's action, as an ultimate check in the disposition and handling of the nation's public property. We deride the comments by our opposition in allusion to "deeply grounded" public policies which purportedly forbid citizens and taxpayer's actions. As a practical matter, this form of litigation is infrequent in occurrence. Such has been the experience in Illinois and all other jurisdictions which likewise recognize taxpayer's actions. As any practicing lawyer well knows, the citizens and taxpayer's right of action is so costly a burden as to generally preclude its exercise except under extraordinary circumstances, as at hand, strong enough to impel the spending of private money, not public money, in the defense of the public interest. Furthermore, from the history of this form of litigation we can only observe that private citizens engage opponents of great strength and resources

only when the wrong is great and the governmental default is palpable.

Finally, we acknowledge, as respondents have alleged on page 4 of their brief in opposition, that since last Spring and the decision in the Court of Appeals below that the plaintiffs as citizens and taxpayers *of Illinois* instituted a state court action. But, contrary to what respondents have stated in their brief, such state court proceeding affects only the rights of the public in the submerged lands of Lake Michigan filled in by the defendant railroad. No question is there raised regarding the congressional Act of 1850, as here involved. We urge that the filing of such state court action has no affect on the propriety of the plaintiffs' instant petition for the issuance of the writ. The filing of such state court action was deemed proper in view of the holding of the Court of Appeals, below, and as a timely and appropriate procedure pending the issuance or denial of the writ for which we respectfully petition here. Even if this later state court suit was identical to the cause at hand, such fact would be irrelevant here. It is a long-established rule that once the jurisdiction of a federal court has attached it cannot be "taken away, arrested, diminished, disturbed, or interfered with by proceedings subsequently instituted in another court." The later proceedings are merely suspended to avoid defeating or impairing the jurisdiction of the first court (See 21 C.J.S. Sect. 529, at pp. 809-811 and cases cited at notes 98 and 2).

Petitioners, both *first* as citizens and taxpayers on behalf of the People of the State of Illinois and *second* as citizens and taxpayers on behalf of the People of the United States, respectfully urge to this Honorable Court their right to assert the instant federal question in a federal court and pray that the Writ of Certiorari be granted.

All of which is respectfully submitted.

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